

No. 11286

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellees.

OPENING BRIEF FOR CROSS-APPELLANT
HAROLD LLOYD CORPORATION UPON
ITS CROSS-APPEAL.

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To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Statement of Pleadings and Jurisdictional Facts.

The plaintiff Harold Lloyd Corporation (Appellee and Cross-Appellant) filed its complaint against defendants Universal Pictures Company, Inc. and Clyde Bruckman (Appellants and Cross-Appellees) in the United States District Court, for damages and injunctive and other relief arising from infringements by defendants upon plaintiff's copyrighted motion picture photoplay entitled "MOVIE CRAZY" [Tr. pp. 2-7].

Defendants' answers denied infringement but admitted production and distribution of the alleged infringing motion picture photoplay entitled "So's YOUR UNCLE" [Tr. pp. 17-26].

Jurisdiction of the Federal Courts was and is invoked under the provisions of Section 34 of the Copyright Act of 1909 (March 4, 1909, Chap. 320, Sec. 34, 35 Stats. 1084). See also Section 25, (a) and (b), 35 Stats. 1081, March 4, 1909, Chap. 320; Aug. 24, 1912, Chap. 356, 37 Stats. 489.

Statement of the Case.

During the years 1931 and 1932 cross-appellant Harold Lloyd Corporation (hereinafter referred to as plaintiff) produced a motion picture photoplay entitled "MOVIE CRAZY" starring Harold Lloyd and costing in excess of \$650,000 [Finding of Fact V, Tr. p. 33].

This motion picture photoplay was on September 15, 1932 duly copyrighted in the United States by the plaintiff which at all times since has retained its sole ownership thereof [Finding of Fact VI, Tr. p. 33].

During the course of this production the plaintiff Harold Lloyd Corporation employed the individual defendant

Clyde Bruckman as one of the writers and directors of its motion picture "MOVIE CRAZY" and paid Bruckman \$42,900 for his services [Finding of Fact IV, Tr. p. 33]. Bruckman thus acquired full knowledge of the contents of plaintiff's motion picture. Twelve years later, and during the year 1943, the individual defendant Bruckman was employed by his co-defendant Universal Pictures Company, Inc. as a writer to assist in the preparation of defendant's infringing motion picture photoplay entitled "So's YOUR UNCLE"; in which photoplay the defendants knowingly, wilfully, and deliberately incorporated a sequence of fifty or more consecutive scenes bodily copied and misappropriated by them from the plaintiff's motion picture "MOVIE CRAZY" [Finding of Fact VII, Tr. p. 34].

Defendants' motion picture was exhibited in more than 5,000 theaters located throughout the United States in deliberate violation of the plaintiff's rights and after full information of the misappropriation had been given to Jean Yarbrough, the individual producer placed by the defendant Universal Pictures Company, Inc. in charge of the production of its infringing motion picture [Findings of Fact VII and VIII, Tr. pp. 35, 36].

The trial Court found that plaintiff's damages, by reason of the infringements, aggregated \$40,000, for which amount judgment was awarded against both the defendants Bruckman and Universal Pictures Company, Inc. [Findings of Fact IX and X, Tr. pp. 35, 36; Conclusion III, Tr. p. 39; Judgment, Tr. p. 42].

The trial Court further found that the total amount of profits realized and derived by the defendant Universal Pictures Company, Inc. from distribution of the infring-

ing motion picture photoplay “exceeds \$20,500” but that only 20% of such profits were derived from infringements upon plaintiff’s copyright [Finding of Fact XII, Tr. p. 36]; but that the plaintiff was not entitled to judgment awarding any part of the profits “by reason of the fact that the actual damages suffered by plaintiff due to said copyright infringements exceeds the aggregate sum of profits made, received and derived by said defendant from such copyright infringements” [Conclusion of Law IV, Tr. p. 39].

The plaintiff appeals from the judgment upon the ground that the actual damages found by the trial Court were and are wholly inadequate; furthermore that there was no evidence to support an apportionment of profits and in the absence of any evidence with respect thereto, that plaintiff was entitled to an award of the whole thereof in addition to damages; or in the alternative that plaintiff was entitled to an award of statutory damages of at least \$250,000 “in lieu of actual damages and profits”.

The primary question to be determined upon this appeal is the nature, scope and extent of relief which could and should be awarded for infringement of plaintiff’s copyright.

The plaintiff contends that the Copyright Act expressly authorizes recovery of “such damages as the copyright proprietor may have suffered due to the infringement *as well as all the profits* which the infringer shall have made from such infringement. . . . Or in lieu of actual damages and profits, such damages as to the court shall appear to be just” (Section 25(b), 35 Stat. 1081, March 4, 1909, Chap. 320).

Defendants contend that plaintiff is not entitled to recover any profits since plaintiff's damages exceed the profits allocable to the copyright infringements; and that in no event is a court justified in awarding such statutory damages as it deems just if there is any competent proof of *either* damages *or* profits attributable to the infringements.

Plaintiff's reply to defendants' contentions is that they violate the express provisions of the Copyright Statute and deprive the Court of the very authority heretofore exercised by this Court in such cases as *Turner & Dahlen v. Crowley*, 252 Fed. 749 (C. C. A. 9).

Specification of Errors Relied Upon.

Cross-Appellant Harold Lloyd Corporation relies upon the following specification of errors which it intends to urge upon this cross-appeal:

1. *The District Court erred in rendering a judgment for inadequate damages and in finding that the extent to which plaintiff had been damaged by defendants' infringements, did not and does not exceed the sum of \$40,000 [Findings of Fact IX, X, Tr. pp. 35, 36; Conclusion 3, Tr. p. 39; Judgment, Tr. p. 42].*

In this respect plaintiff will contend that the only competent evidence received by the trial Court would have sustained and did require a judgment for actual damages of \$250,000 or more [see Cross-Appellant's Statement of Points numbered I, II, III, Tr. p. 542].

2. *The District Court erred in finding that profits derived by the defendant Universal Pictures Company, Inc. from infringements upon plaintiff's copyright was and is 20% and no more of the total profits derived from*

distribution of the infringing motion picture photoplay and the District Court further erred in failing and refusing to award to the plaintiff all of the profits derived from the production and distribution of such motion picture photoplay [Cross-Appellant's Statement of Points VII and VIII, Tr. p. 543].

In this respect plaintiff contends that the finding allocating 20% of the profits [Finding of Fact XII, Tr. p. 36] is wholly without support in the evidence and that the trial court's conclusion [Conclusion IV, Tr. p. 39] that no profits derived from the copyright infringements may be awarded where actual damages exceed such profits, is contrary to law and contrary to the express wording of the Copyright Statute.

3. *That plaintiff was entitled to a minimum award of \$250,000 as statutory damages in lieu of actual damages and profits if there be any doubt as to the competency of plaintiff's evidence respecting its actual damages [Cross-Appellant's Statement of Points VI, Tr. p. 543].*

4. *The District Court erred in sustaining defendants' objections to plaintiff's offer of proof relating to the value of reissue and remake rights in comparable sound and talking motion pictures starring Harold Lloyd [Cross-Appellant's Statement of Points IV, Tr. p. 542],*

Plaintiff's written offer of proof filed at the direction of the Court appears in the Transcript pages 29-31, and (omitting a portion of said offer not relied upon or urged upon this appeal) reads as follows:

"Now comes plaintiff Harold Lloyd Corporation and pursuant to direction of the Court to file its Offer of Proof in writing, hereby offers to prove the following facts and each of them severally as a

part of the evidence offered at the trial on behalf of the plaintiff, to-wit:

"1. That on or about March 14, 1945 Samuel Goldwyn purchased from Paramount Pictures Inc. for the sum of \$125,000 in cash, the 'remake' rights of the motion picture starring Harold Lloyd entitled 'THE MILKY WAY'.

"2. That as additional consideration for the sale and transfer of said remake rights in the motion picture 'THE MILKY WAY' Paramount Pictures Inc. received from Samuel Goldwyn the 'loan-out' of the services of Teresa Wright, an outstanding motion picture star, upon payment of said star's regular salary without bonus, premium or additional compensation, to Samuel Goldwyn, although such additional bonus, payment or compensation is customary and usual in the motion picture industry where an outstanding star is under exclusive contract to one producer and her services are 'loaned out' to another producer for a single motion picture production.

"3. That said motion picture 'THE MILKY WAY' starring Harold Lloyd was not a financial success when originally produced and distributed in 1936 by Paramount Pictures Inc. and said motion picture failed to recoup its negative cost although said motion picture was a 'sound and talking' motion picture comparable in story and production value to 'Movie Crazy' excepting only that it lacked an outstanding comedy sequence such as the 'magician's coat' sequence in 'Movie Crazy'.

“Said offers of proof and each of them are made upon the following grounds and each of them:

“1. In rebuttal of evidence offered and received on behalf of the defendants, and for the express purpose of disproving, contradicting, and rebutting defendants’ testimony that the reissue and remake rights in comparable comedy motion pictures produced by or starring Harold Lloyd were ‘negligible’ or of ‘no value’ during the year 1945.

“2. For the further purpose of corroborating and explaining the testimony of plaintiff’s witnesses Lloyd, Landau, Bentel and Botsford and for the further purpose of enabling said expert witnesses to include the facts above stated in their reasons for testifying that reissue and remake rights of motion pictures starring Harold Lloyd have substantial monetary value regardless of the lapse of ten or more years since their initial production, release and distribution.

Respectfully submitted,

HAROLD A. FENDLER,

[Tr. pp. 29-31.]

Attorney for Plaintiff.”

On December 17, 1945 plaintiff’s counsel stated to the Court with respect to the foregoing offer of proof:

“There is an offer of proof which your Honor directed to be filed in writing,”

to which the Court replied:

“That will be deemed filed. For the reasons heretofore stated, the evidence has been rejected” [Tr. p. 492].

The Court's direction to file a written offer of proof was made on November 16, 1945, during the direct examination of A. M. Botsford, as follows:

"Q. By Mr. Fendler: Are you able, Mr. Botsford, to compare the Harold Lloyd talking motion picture of 'Movie Crazy' and 'Milky Way' with respect to story value, cost, success and profits?

Mr. Abeles: I object to that, if the court please.

The Court: Objection sustained.

Mr. Fendler: May I make an offer of proof?

The Court: You may submit your offer in writing at a later time."

Previously a verbal offer of proof had been made:

"Mr. Fendler: If your Honor please, we subpoenaed a witness, the general manager of the Samuel Goldwyn Pictures Corporation. Counsel for Universal has denied that the sale price of the re-make rights of 'Milky Way' was \$125,000. Mr. Selvin, who represents Samuel Goldwyn, asked me whether I would be willing to have this witness disregard the subpoena if he brought the original contracts to court at which time the defendants might desire to object upon the ground that the evidence of the payment of \$125,000 for the re-make rights was immaterial and incompetent, upon which the court would rule, and if the court overruled the objection, then in such event the fact would be received in evidence just as if the witness testified to it here in person. Is that the understanding, Mr. Selvin?

Mr. Abeles: Wait a minute, Mr. Selvin.

Mr. Herman Selvin: If I may state to the court, the position that I took with Mr. Fendler and with counsel for the defendants also—I am perfectly

willing to produce and have the contracts in question. I do not desire that they be made public property unless they be ruled competent and relevant to the issue in this case. Whether they are or not, I don't now. I have nothing to do with that. If they are ruled to be admissible the contracts are here and I am sure that the parties could agree that they are correct copies of the contracts without the presence of Mr. Ezzell.

Mr. Fendler: That is the understanding, your Honor, so we submit it to your honor for your ruling.

The Court: Counsel, what another picture sold for in my opinion is not admissible."

Plaintiff's production of the evidence in court was the result of a motion to strike previously granted by the Court with respect to testimony elicited from Harold Lloyd, who made the following answer when the trial Court asked the following question [Tr. pp. 367, 368]:

"The Court: * * * And in addition to that other studios will buy from a studio pictures that have been produced in the past, is that correct?

The Witness: Oh, yes, they buy the story, remake it sometime. For instance, 'Milky Way' at the present time is a picture that I starred in and had a 50 per cent interest in. That particular picture sold to Samuel Goldwyn. I think it was sold for around \$125,000."

During Mr. Lloyd's previous examination on the witness stand the following had taken place [Tr. pp. 107-109]:

"Q. By Mr. Fendler: Do you have knowledge as to the prices which have currently been paid for

re-makes and the prices currently received from re-issues of pictures previously made, either silent or talkies? Do you have knowledge on that subject?

A. Are you talking about stage plays also?

Q. Well, particularly knowledge of re-makes of pictures and re-issues of pictures—just yes or no. A. Yes.

Q. Will you state to the court what that knowledge consists of?

Mr. Lewinson: That is objected to on the grounds it is irrelevant, immaterial and incompetent.

The Court: What is the purpose of the question?

Mr. Lewinson: No foundation laid.

Mr. Fendler: We desire to show, if your Honor please, that the figures which have been given by the witness are not pulled down from the air at all, but that re-make rights and re-issue rights are currently being sold for figures upwards of one and two hundred thousand dollars. We desire to show, for example, that the re-make rights of one picture—

The Court: Well, counsel, the trouble with that evidence is this: When you do that, then the whole picture is involved. Whenever you start to compare one picture with another you are getting into a pretty deep subject. I think that you go far enough with this witness when he testifies that they have a market value, you might say, either a story to be sold to others or to re-make them or re-vamp them and re-issue them. As far as that is concerned, as soon as you start to say that this picture might be compared, or, to use the example, certain other pictures, he naturally, in his own mind, would have to base it upon other pictures that he has known to have brought in those values. And then it comes to a

question of comparative value of pictures and the merits or demerits of the various pictures. And I think you are getting far afield. We never would end in that respect. You would have the court out there for the next two weeks looking at the various pictures.

Mr. Fendler: May I state this, your Honor, in order that our position will be clear on it? Of course, it is much easier when you compare the value of a Packard with a Cadillac automobile, although the two automobiles are quite different.

However, in the picture business people who are qualified to judge can say generally that 'A' pictures which had a production cost of \$500,000 to \$1,000,000 and have grossed from a million and a half to four million dollars fall within a certain general bracket; and that re-make rights or the re-issue rights of these pictures that have literally grossed millions have a definite market value, possibly not to the penny, but nevertheless, to a point where an approximation can be made which would be of some assistance to this court.

I might say the authorities that we propose to offer in connection with damages say very frankly that where the defendants' wrong has inflicted damage and it is difficult of ascertainment, that it does not lie in the mouth of the defendants to complain that we cannot set a value to a nickel. But what we do propose to show, from people well known in the industry, is that the re-issue and re-make rights of a Lloyd picture which costs, we will show, \$650,000 to produce and grossed a million and a half upon [at]

the bottom of the depression has a re-make right and a re-issue right in the value—that is, it did have before ‘So’s YOUR UNCLE’ was produced—in the amount stated by Mr. Lloyd or more. That is our case.

The Court: All right. He has testified to every one of those things, counsel. He has testified as to what he considers the difference in the value of his film before and after the release of ‘So’s YOUR UNCLE’, and this other is in a sense cumulative. He has testified to his experience and the part he played in the motion picture industry. He has testified as to his knowledge. As quick as we go into that we start comparing pictures. Presume, for instance, that one they started to show yesterday afternoon by mistake, we would have to determine whether it was a picture like that or it was a picture like ‘So’s YOUR UNCLE’ or ‘MOVIE CRAZY’ from the pictures themselves.

Mr. Fendler: That was the reason that I was attempting to confine it.

The Court: Some pictures click. We recognize that on some pictures there has been a lot of money spent which have not clicked. There is an element of risk in the industry and they all recognize it.

Mr. Fendler: We were going to confine our evidence to pictures in the bracket and in the class of Mr. Lloyd’s. But if your Honor feels that it is improper, I have made my offer and I feel that it is competent, but I do not want to argue it any further.”

Summary of Argument.

POINT I: THE JUDGMENT FOR DAMAGES IS INADEQUATE.

(A) PLAINTIFF'S EVIDENCE OF GENERAL DAMAGES.

(B) PLAINTIFF'S EVIDENCE OF SPECIAL DAMAGE CONSISTING OF IMPAIRMENT AND DESTRUCTION OF VALUE OF REISSUE AND REMAKE RIGHTS OF PLAINTIFF'S COPYRIGHTED MOTION PICTURE.

(C) THE PREJUDICIAL ATTITUDE OF THE TRIAL COURT TOWARDS THE AMOUNT OF DAMAGES SUSTAINED BY PLAINTIFF.

POINT II: THE TRIAL COURT ERRED IN APPORTIONING TWENTY PER CENT OF DEFENDANTS' PROFITS TO THEIR COPYRIGHT INFRINGEMENTS AND IN REFUSING TO AWARD ANY PROFITS TO THE PLAINTIFF UPON THE GROUND THAT PLAINTIFF'S DAMAGES EXCEEDED DEFENDANTS' PROFITS.

(A) THERE WAS NO EVIDENCE TO SUSTAIN THE ARBITRARY ALLOCATION BY THE TRIAL COURT OF 20 PER CENT OF DEFENDANTS' PROFITS TO THEIR COPYRIGHT INFRINGEMENTS.

(B) THE COURT ERRED IN REFUSING TO AWARD ANY PROFITS TO THE PLAINTIFF.

POINT III: WHERE DAMAGES AS WELL AS PROFITS ARE DIFFICULT OF ASCERTAINMENT THE COURT SHOULD AWARD STATUTORY DAMAGES IN SUCH SUM AS SHALL APPEAR TO BE JUST (BEARING IN MIND THAT THE STATUTORY SCHEDULE OF \$100 FOR THE FIRST INFRINGING PERFORMANCE AND \$50 FOR EACH SUBSEQUENT INFRINGING PERFORMANCE, IS BY STATUTE EXPRESSLY "NOT TO BE REGARDED AS A PENALTY").

ARGUMENT.

POINT I.

The Judgment for Damages Is Inadequate.

The trial court rendered judgment in favor of plaintiff Harold Lloyd Corporation for \$40,000 damages and made specific findings of fact [Finding IX, Tr. p. 35] that by reason of defendants' infringements "plaintiff has been damaged by defendants and each of them in the sum of \$40,000."

The Court further found "that plaintiff's rights to re-issue and remake plaintiff's motion picture photoplay "MOVIE CRAZY" were substantially damaged and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damaged did not and does not exceed the sum of \$40,000" [Finding X, Tr. p. 36].

Plaintiff had pleaded in its complaint *general* damages of \$200,000 [Complaint, Para. X, Tr. p. 5] and *special* damages of \$200,000 resulting from destruction of the value of plaintiff's rights to reissue and remake its copyrighted motion picture [Complaint, Para. XI, Tr. p. 5].

A. PLAINTIFF'S EVIDENCE OF GENERAL DAMAGE.

In support of its claims to general damages, the trial court received evidence that plaintiff's motion picture had cost \$652,853.86 to produce [Tr. p. 175] and \$414,010.14 to distribute [Tr. p. 176]; that it had taken the plaintiff twenty-one months to produce such motion picture, from October, 1930, until July, 1932, and that eleven writers had been employed thereon at a total cost of \$66,373.67 [Plaintiff's Ex. 2, Tr. p. 174].

Further evidence was received that the gross amount received from distribution was \$1,439,182.21 leaving a net profit of nearly \$400,000, although the motion picture was released when this country was at the bottom of the depression period (*e.g.*, 1932, 1933).

Plaintiff's motion picture photoplay was released in more than fifty countries throughout the world [Tr. p. 184] and the particular sequence misappropriated by defendants was estimated to have cost the Harold Lloyd Corporation approximately \$188,000 [Tr. p. 180].

A stipulation was entered into between counsel that defendants' infringing motion picture "So's YOUR UNCLE" was exhibited in 6636 theaters throughout the United States [Tr. p. 90].

It was also stipulated that the records of the Southern California branch of the Universal Film Exchange (a subsidiary distributing corporation wholly owned by Universal Pictures Company Inc.) reflected the fact that in Southern California 248 theaters exhibited the defendants' infringing picture on 566 play dates [Tr. p. 90].

The significance of these stipulations was stated by plaintiff's counsel at the trial as follows [Tr. p. 169]:

"There is in evidence a stipulation of 6,636 theaters. The evidence here in California, from the Southern California Exchange, shows a ratio of 2.28 playing dates to each theater. If that measure be applied to the 6,636 theaters there will be in excess of 15,000 playing dates; and the court will take judicial notice that the playing dates include anywhere from two to four performances. In other words, if it is on a Saturday or Sunday, there are four per-

formances; if it is just in the evening, it is two performances.

“So we actually have the evidence before Your Honor to establish 30,000 or more infringing performances on the basis of the stipulations in evidence.”

It is plaintiff's contention that general damages might properly be found by a court predicated upon evidence of the nature and value of plaintiff's property; the scope and extent of its misappropriation, and proof of the number of infringing performances in theaters in which the plaintiff's property has been used without its consent. (See *United States Frumentum Co. v. Lauhoff*, 6th C. C. A., 216 Fed. 610, at page 617, where “general damages” are expressly defined as “damage not resting on any of the applicable, exact methods of computation but upon facts and circumstances which permit the jury or the court to estimate in a general, but in a sufficiently accurate way the injury to plaintiff caused by each infringing sale.”)

By analogy in *Sinclair Refining Co. v. Jenkins*, 289 U. S. 689, Mr. Justice Cardozo wrote a unanimous opinion for the U. S. Supreme Court expressly holding a patent to be a “thing unique” and that the absence of a ready market or market price or the difficulties in proving value do not relieve an infringer from liability for damages; the Court stating at page 697:

“This is not a case where the recovery can be measured by the current prices of a market. A patent is a thing unique. There can be no contemporaneous sale to express the market value of an invention that derives from its novelty its patentable quality. Cf. *United States v. Swift & Co.*, 270 U. S. 124;

Todd v. Gamble, 148 N. Y. 382; 42 N. E. 982. But the absence of market value does not mean that the offender shall go quit of liability altogether. The law will make the best appraisal that it can, summoning to its services whatever aids it can command. *United States v. Swift & Co.*, *supra*; *U. S. Frumentum Co. v. Lauhoff*, 216 Fed. 610; *Industrial & General Trust, Ltd. v. Tod*, 180 N. Y. 215, 232; 73 N. E. 7; *Sedwick Damages*, 9th Ed., Vol. 1, pp. 491, 504. At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of efficiency or saving of expense. *Dowagian Mfg. Co. v. Minnesota Molina Plow Co.*, 235 U. S. 641, 648, 649; *Suffolk v. Hayden*, 3 Wall. 315, 320; *U. S. Frumentum Co. v. Lauhoff*, *supra*."

At page 699:

"Value for exchange is not the only value known to the law of damages. *There are times when heed must be given to value for use, if reparation is to be adequate.* *Barker v. Lewis Storage & Trans. Co.*, 78 Conn. 198; 61 Atl. 363; *Green v. Boston & Lowell R. Co.*, 128 Mass. 221; *Citizens Bank v. Fitchburg Fire Ins. Co.*, 86 Vt. 267; 84 Atl. 970; *McAnarney v. Newark Fire Ins. Co.*, 247 N. Y. 176, 184, 185; 158 N. E. 902; *Sedwick*, *supra*, pp. 504-507.

* * * * *

"Formulas of measurement declared *alio intuitu* may be misleading if wrested from their setting and applied to new conditions. See, *e.g.*, *Standard Oil Co. v. So. Pac. Co.*, 268 U. S. 146, 155. *The market test failing, there must be reference to the values*

inherent in the thing itself, whether for use or for exchange. (Industrial General & Trust Co. v. Tod, supra.)”

See also: *Palmer v. Connecticut Ry. Co.*, 311 U. S. 544, where the U. S. Supreme Court approved an expert estimate of damage resulting from the loss of a lease having 969 years more to run, upon the ground that an injured party “is not to be barred from a fair recovery by impossible requirements” and a wrongdoer should not be permitted to escape “under cover of a demand for non-existent certainty.” (Citing *Sheldon v. Metro-Goldwyn Corp.*, 309 U. S. 390, 406-408.

B. PLAINTIFF'S EVIDENCE OF SPECIAL DAMAGE CONSISTING OF IMPAIRMENT AND DESTRUCTION OF VALUE OF REISSUE AND REMAKE RIGHTS OF PLAINTIFF'S COPYRIGHTED MOTION PICTURE.

In addition to pleading *general* damages of \$200,000 sustained by plaintiff by reason of defendants' copyright infringements [Complaint, Para. X, Tr. p. 5] plaintiff pleaded *special* damage as follows:

“That prior to the infringements hereinbefore complained of, the rights to re-issue, reproduce and remake said motion picture photoplay entitled ‘MOVIE CRAZY’ were reasonably worth \$200,000.00 but by reason of the infringing acts of defendants hereinbefore alleged, the value of said rights has been totally destroyed and by reason of the premises plaintiff has been specially damaged in the further and additional sum of \$200,000.00.” [Complaint, Para. XI, Tr. p. 5.]

The findings made by the trial court with respect to the allegations of special damage were as follows [Finding X, Tr. p. 36]:

“The Court further finds that plaintiff’s rights to reissue and remake said motion picture photoplay entitled ‘MOVIE CRAZY’ were substantially damaged and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damage did not and does not exceed the sum of \$40,000.00.”

Plaintiff contends that the evidence received upon the issue of special damage *compelled* a finding of at least \$200,000 special damage, and in this connection the plaintiff furthermore contends that defendants offered no competent evidence to contradict or impeach plaintiff’s witnesses.

In brief, plaintiff’s evidence was as follows:

Harold Lloyd, the president of the plaintiff corporation, testified that he had engaged in the motion picture business for thirty years or more; that he had charge of all his own productions; and that his experience covered the entire field of writing, production and distribution, “practically everything that there is to do with the [a] motion picture” [Tr. p. 98]. Prior to the release of defendants’ infringing motion picture, Mr. Lloyd testified that the value of reissue rights of the plaintiff’s motion picture was “well over \$100,000” and that the value of the remake rights was “200,000, probably a great deal more”; but that the value of both reissue and remake rights had been destroyed, since the release of the defendants’ infringing motion picture [Tr. pp. 104-105]. Mr. Lloyd further testified that reissuing a motion pic-

ture (“putting the same picture into distribution again,” *c.g.*, “making new prints from the same old negative”) was a well known practice in the industry and that re-making a picture was and is a practice “much engaged in” in the motion picture industry [Tr. p. 106].

Mr. Lloyd furthermore testified that he was fully informed and had knowledge as to the prices currently paid in the industry for remakes and reissues of old pictures [Tr. p. 107]. However, Mr. Lloyd testified that it had been his intention “to remake all my popular pictures over myself” and that he was sure in this way his older pictures such as “MOVIE CRAZY” would be of a great deal more value to him than to anyone else [Tr. p. 110].

With respect to the particular sequence misappropriated by the defendants, Mr. Lloyd testified that “the whole sequence is naturally tied into the story; it is the heart of our story and without that particular sequence tied into it the story is certainly destroyed” [Tr. p. 137]. He further testified that the sequence in question was an integral and essential part of the story and that it played a functional part in the development of the picture; that it was “one of the funniest sequences I have ever had in in any picture, when you take out a chunk of film practically anywhere out of one of our pictures, you certainly destroy that picture” [Tr. p. 139]; further that the picture could not be reissued or remade without the sequence in question which was “one of about three or four of the funniest comedy sequences that I have ever had in my whole career” [Tr. pp. 140, 141].

Mr. Arthur Landau, an expert witness called by the plaintiff, testified that he had been in the motion picture business for approximately 25 years and had been associ-

ated with the World Film Corporation, First National Pictures and United Artists for more than ten years; that he had formed his own agency known as the Arthur Landau Agency and had subsequently joined with Edward Small to form the Small-Landau Agency representing independent producers, artists, writers, and story material, and that his duties required him to familiarize himself with the value of story material and completed pictures. That he had produced motion pictures for a period of three years either himself or in association with others; and that at the time of trial he was associate producer at United Artists Studio [Tr. pp. 253-255]. Mr. Landau further testified that he had been called and qualified as an *expert witness on behalf of the defendant Universal Pictures Company, Inc.*, in a plagiarism action brought by Anne Nichols (the author of "Abie's Irish Rose") against Universal and that in his opinion the value of the reissue rights of "MOVIE CRAZY" prior to the release of defendants' infringing motion picture was \$100,000 and that the value of the remake rights had been "around \$200,000"; but that since the distribution and release of defendants' infringing motion picture, such reissue and remake rights were not worth much of anything, *e.g.*, "a very nominal sum" [Tr. pp. 256-258].

Mr. Landau's primary reason for his opinion was that exhibitors would not purchase either a reissue or remake of Harold Lloyd's "MOVIE CRAZY" after having played or seen the defendants' infringing motion picture "So's YOUR UNCLE" [Tr. p. 258].

A third witness called by the plaintiff, A. M. Botsford, testified that he had been affiliated with the motion picture industry for over 25 years and had been connected with distribution of Paramount Pictures in 1100 or 1200 thea-

ters owned by Paramount-Publix Inc.; that he had been head of the Editorial Board at Paramount for two years and had then become executive assistant to the head of Paramount Studios for approximately five years, in which capacity he had produced approximately fifteen or sixteen pictures; that he had also been associated with 20th Century-Fox and had been Managing Director of the A & S Lyons Agency in Hollywood wherein one of his duties was to interest studios in the possible sale of motion picture rights and that he was definitely familiar with the general market conditions during the years 1942, 1943 and up to and including the date of trial [Tr. pp. 453-456]. Mr. Botsford further testified that he was familiar with motion pictures remade by Paramount and with lists of pictures for sale by producers and with the practice of reissuing pictures after they had been stored away for a number of years [Tr. pp. 458, 459]. Mr. Botsford testified that in his opinion the value of the reissue rights of "MOVIE CRAZY" prior to the distribution of defendants' infringing motion picture was \$100,000 "somewhere around that figure" and that the reasonable value of the remake rights were "from \$125,000 to \$150,000" [Tr. p. 462], but that after Universal released a feature picture containing the same sequence "the market is entirely off" [Tr. p. 465]; that in four or five years the "reissue and remake value might be worth something" but "certainly not what it would be worth if it were not for those pictures" [Tr. p. 464].

A fourth witness called by plaintiff, George Bentel, testified that he had been a producer of stage plays and motion pictures as vice-president and general manager of Oliver Morosco Productions, and in association with Louis B. Mayer and William Selig; and that he had acted

as a broker and agent of plays and motion pictures for twenty years or more, representing Jack London, James Oliver Curwood, and others and had familiarized himself with the market values of reissue and remake rights of motion pictures [Tr. pp. 196, 198] and that in his opinion the value of the reissue rights of "MOVIE CRAZY" was \$150,000 and the remake rights \$250,000 prior to the distribution and release of defendants' infringing motion picture; but that as of the date of filing the action that 90% of such value had been lost [Tr. p. 203; see also pp. 406, 410].

Defendants attempted to show that some of the damage to the reissue and remake rights of plaintiff's motion picture "MOVIE CRAZY" resulted from a prior release of a short two reel motion picture by Columbia Pictures Corporation entitled "LOCO BOY MAKES GOOD" in which the defendant Clyde Bruckman had misappropriated the same sequence, but each and all of plaintiff's witnesses testified that a "short" is not in competition with a feature length photoplay and that the sequence had been done so badly in the Columbia short that exhibitors who "bought the picture" would very likely not have exhibited it and that in any event no substantial harm or damage had been done to Lloyd's feature picture by the comedy short [See Lloyd, Tr. pp. 373-4; Botsford, Tr. p. 465; Landau, Tr. pp. 400-406].

Against this overwhelming evidence by well qualified experts that the plaintiff had sustained actual damage of \$250,000 or more (\$100,000 for loss of reissue rights and \$150,000 or more for destruction of remake rights) the defendants produced three witnesses who effectually disqualified themselves as having no knowledge concerning

either remake or reissue values with the possible exception of one witness, Hirliman, who testified he had “no opinion as to the remake value” [Tr. p. 427] and that he “did not know as to the reissue value but it had no value to me” [Tr. p. 425].

We proceed to analyze the testimony of defendants’ witnesses who, as stated by the trial court with respect to the witness Blake, “I want to say right now as far as this witness’ testimony, with his qualifications, that his testimony has practically no weight as to the issues involved” [Tr. p. 300].

The first witness called by the defendants with respect to the value of reissue and remake rights of Harold Lloyd’s motion picture was James Geller, who testified to experience as a story editor for one month at Universal and three years at Warner Bros., and prior to that time as a literary agent in New York and Hollywood [Tr. p. 265]. Geller was asked as to his opinion of the present value of the reissue and remake rights of “MOVIE CRAZY” to which he replied that such value was “negligible” [Tr. p. 267]; and that the reissue rights of “MOVIE CRAZY” were not in any way affected by the use of the misappropriated sequence in defendants’ motion picture [Tr. p. 268]. Upon cross-examination Mr. Geller testified, however, that he had never produced any motion pictures; that he had never distributed any pictures; that he had never sold any motion pictures; that he had no ideas as to what the plaintiff’s motion picture “MOVIE CRAZY” had grossed [Tr. p. 274]; that he did not know how many pictures had been reissued by Universal within the past ten years and hadn’t seen any that had been reissued [Tr. p. 275]; that he did know an Irene Dunne picture entitled “IMITATION OF LIFE” had been reissued

by Universal but did not know whether the gross on the reissue paid for advertising or prints [Tr. p. 276].

Mr. Geller furthermore testified that "MERTON OF THE MOVIES" (which generally dealt with the same theme) had been sold for remake but that he "had no idea of the price paid" [Tr. p. 279]; that he knew that Charles Chaplin's pictures had been reissued but was not familiar with the amounts received on the reissue of the same [Tr. p. 281]; that he was not familiar with the amounts received upon the reissue of any pictures and did not know what the consideration was upon the sale of reissue rights [Tr. p. 282].

It is obvious from a bare reading of Mr. Geller's cross-examination that he was not qualified to express an opinion as to the value of reissue or remake rights of the plaintiff's picture or of any other picture and that he had no knowledge whatsoever as to the prices paid for reissues or remakes of previous pictures. Certainly the testimony of this witness could not be accepted by any Court as overcoming the evidence of such experts called by the plaintiff as Lloyd, Landau, and Botsford, whose qualifications and experience were virtually conceded by the defendants, and who were abundantly prepared to support their testimony by specific figures as to amounts currently paid for reissue and remake rights of comedies comparable to the plaintiff's motion picture starring Harold Lloyd.

The second witness called by the defendants was Foster Blake, a branch manager of Universal Film Exchange,

a subsidiary corporation distributing motion pictures produced by the defendant Universal Pictures Company. Mr. Blake testified that he had an opinion as to the reissue value of the plaintiff's motion picture, to which the Court itself interpolated "there is nothing to show that this man has any qualifications in that respect" [Tr. p. 294]. The following excerpt from Blake's testimony is illuminating:

"The Court: . . . Have you ever had anything to do with the sale of pictures, for instance, like where Harold Lloyd owned this picture and the sale of it to another studio? A. No, sir. I am only selling pictures to theaters."

At the conclusion of Mr. Blake's testimony the court stated:

"I just do not feel that his testimony helps me" [Tr. p. 300].

The third and final witness called by defendants was George Hirliman who testified that he had been in the motion picture business for approximately thirty years and was the president of a company which purchased reissue and remake rights of motion pictures [Tr. pp. 420-421]. In this connection the witness testified that he had been associated with companies which for three and one-half or four years had purchased reissue rights to 150 or more feature motion pictures. Nevertheless Mr. Hirliman testified with respect to the reissue value of Lloyd's motion picture "Movie Crazy": "I don't know as to the

reissue value but it had no value to me.” [Tr. p. 425.] Upon the issue of remake value the witness expressly testified he had “no opinion” [Tr. p. 427].

Upon cross-examination Mr. Hirliman testified that he had leased 35 pictures from Samuel Goldwyn for purposes of reissue for a consideration of \$1,350,000; that he had paid Selznick \$100,000 for the purchase of Selznick pictures and that the estimated gross on the reissue of a comedy motion picture entitled “Topper” in the United States alone was in excess of \$250,000 [Tr. p. 443].

Although attempts were made by all of defendants’ witnesses, Geller, Blake and Hirliman, to minimize the importance of the sequence misappropriated from the plaintiff’s motion picture “Movie Crazy” there is no substantial evidence from any of these witnesses which overcomes or impeaches the evidence of the plaintiff’s experts Lloyd, Landau, Botsford and Bentel. Defendants’ own witnesses disqualified themselves and they and the Court commented on their respective lack of qualifications to testify as experts.

Another factor far more important than defendants’ lack of evidence, however, entered into the determination of the trial court that plaintiff’s damages were not more than \$40,000. That factor was a preconceived notion of the trial court that all motion picture values were inflated and that any figures which “emanated from Hollywood” were necessarily ten times higher than they should be and should be discounted proportionately.

C. THE PREJUDICIAL ATTITUDE OF THE TRIAL COURT
TOWARDS THE AMOUNT OF DAMAGES SUSTAINED BY
PLAINTIFF.

Despite an honest, conscientious and intelligent approach to the problem of liability, from the commencement of the trial the District Judge manifested an inclination to discount and minimize any evidence of moving picture production or distribution figures or which related to values or profits in the motion picture industry. In fact, the Court expressly stated: "The Court is dealing with an industry that it does not know anything about" [Tr. p. 110].

It is with extreme reluctance that we set forth specific examples reflecting the approach to the problem of damages by the Trial Court; but the following extracts from the record are abundantly illustrative of the Court's reaction to all of plaintiff's evidence regarding damages:

"The Court: The only thing is, Mr. Fendler, you must remember that this Court is not accustomed to dealing with figures that they deal with in Hollywood. *They always have a couple of extra ciphers on anything they deal with out there.*" [Tr. p. 72.]

"The Court: * * * As I have indicated to counsel, the *figures that come out of Hollywood sound like the national debt and they do not register very strongly with this court*, and if they did register with the special master I would not follow them." [Tr. p. 249.]

“The Court: Counsel, can’t you see the Court’s viewpoint after everything I have said? I will say it again. *These figures of \$100,000, \$200,000 are entirely out of line. You might as well mention the national debt.* Now, if you want to proceed along the same line, I will give you all the leeway you want. You may fill up the record with it and make it as large as you want. *I will sit here and listen, but as far as having any material weight with this court is concerned, it will not.*” [Tr. p. 441.]

In the court’s oral opinion he stated in part [Tr. p. 520]:

“I have listened to the *fanciful* figures that come out of the financial world at Hollywood and it is difficult, if not impossible, for a judge who is not a part of that atmosphere to comprehend or appreciate such *fantastic* figures.” [Tr. p. 520.]

* * * * *

“It may be because I am not a part of the atmosphere of the Hollywood financial world that I have been unfair to Mr. Lloyd, but I can only approach it from my own background. At different times during this case when I have endeavored to bring the parties together I warned you that probably when we finished neither side would be happy because *when one person insists on \$300,000 I move the decimal point over.* * * *” [Tr. p. 520.]

By quoting from the record—and the foregoing examples might be multiplied—we do not mean to charge

the trial court with being arbitrary, capricious, or unreasonable. We feel that Judge Harrison attempted to reach what in his opinion was an honest and fair judgment. Nevertheless a reviewing court is bound to consider all proceedings at the trial including any disposition upon the trial court to consider large figures as "fantastic" or "fanciful" where they are and can be supported by written contracts and documents brought to court for the very purpose of use in evidence. In no event should any witness or litigant be confronted with an attitude of mind on the part of the trial court that the figures "have a couple of extra ciphers" or that the decimal point is wrongly placed.

What would happen to our system of jurisdiction if every trial court or trial jury should assume that the figures testified in good faith and supportable by documentary evidence were ten times larger than they should be; or that justice can only be accomplished by "moving the decimal point over."

We do not feel that a new trial is necessary or desirable. We feel that upon this record the Ninth Circuit Court of Appeals can fix an amount of damages which is consistent with the evidence and can issue its mandate to the trial court directing the entry of a judgment in an amount fixed by this reviewing court as adequate and commensurate with the evidence. That amount, as we have previously indicated, should, in our opinion, be at least \$250,000.

POINT II.

The Trial Court Erred in Apportioning 20 Per Cent of Defendants' Profits to Their Copyright Infringement and in Refusing to Award Any Profits to the Plaintiff Upon the Ground That Plaintiff's Damages Exceeded Defendants' Profits.

A. THERE WAS NO EVIDENCE TO SUSTAIN THE ARBITRARY ALLOCATION BY THE TRIAL COURT OF 20 PER CENT OF DEFENDANTS' PROFITS TO THEIR COPYRIGHT INFRINGEMENTS.

The only evidence offered by the defendants in support of an allocation of profits resulting from infringing use of plaintiff's copyrighted material was during the testimony of James Geller, as follows:

“Q. By Mr. Knupp: Mr. Geller, in your opinion, assuming that the Universal picture ‘So’s Your Uncle’ made any profits, what proportion of the profits do you think were contributed by this sequence that we have been discussing?”

Mr. Fendler: Objected to as calling for a conclusion of the witness upon a matter he is not qualified to testify to.

The Court: You are both delving into the same matters, so what is fair for one is fair for the other. Objection overruled.

The Witness: Will you please repeat the question?

(Question read by the reporter.)

A. I would have to be a genius to tell you that. I wouldn’t know. * * *

The defendants' witness Blake, who was the branch sales manager of the Universal Films Exchange in Los Angeles, expressly testified he did not believe he was qualified to answer the question as to what proportion of the profits earned by "So's Your Uncle" may have been contributed or may be charged or attributable to this particular sequence [Tr. pp. 299-300].

The fact that there was no evidence to support an apportionment of profits was thoroughly apparent both to plaintiff's counsel and defendants' counsel. We respectfully refer the Court to the following:

"Mr. Knupp: . . . If the question of profits is to be determined or to be considered in arriving at any judgment in this action, the question of the proportion of the profits which are justly attributable to the sequence of the two pictures is something it seems to me would have to be determined by evidence before the court. *There is no evidence of that before the court now.*" The Court heretofore indicated the matter might possibly go to a Master.

"The Court: I said the matter of profits but not the apportionment. Of course I realize that each case has to stand on its own bottom but it has grown into more or less a practice that profits are generally apportioned as in the Sheldon case. The courts to a great extent have followed that procedure.

Mr. Knupp: There are two cases that I know of that the court may have reference to in which I think that was true.

If we could assume or it were stipulated that that were so then we would not think it necessary that any evidence should be offered on the apportionment of profits, but *unless we have the assurance of coun-*

sel that the question will not be raised sometime or other that there was no evidence upon which the court could properly apportion the profits.

The Court: The court having seen both pictures and heard the evidence, I think it is within the sound discretion of the court, according to the decisions I have read, always bearing in mind that if there is anybody to be hurt it is the infringer.

Mr. Knupp: I think, if the court please, that provision for apportioning profits grew out of the similar provision in the patent law—that expert testimony on that matter would be considered.

In the Sheldon case the plaintiffs offered no evidence at all with respect to what proportion of the profits were justly attributable to the infringing material. The evidence was all offered on behalf of the defendants and the court arrived in that case at its determination, apparently not based on what the experts testified to, but placed the figure high enough where the court said in any event it should not exceed that figure. I understand in the case before Judge O'Connor tried in this District there was expert testimony before the court as to the apportionment of the profits. *The only thing that I fear is that there is some question as to whether the court can, without any evidence, arrive at a figure as to what is the just division of the profits as between the infringing material.*

The Court: You gentlemen are privileged to introduce all the expert testimony you desire, but in fixing the liability I am going to follow the Sheldon case.

Mr. Knupp: If the court announces that as its determination, I assume then, of course, evidence would be of no value in any event.

Mr. Fendler: We are prepared to offer evidence, if Your Honor please, that no allocation or profits can justly be made in this case. We are prepared to offer expert evidence on that at this time." [Tr. pp. 470-472.]

* * * * *

"The Court: *If there is any question about it I will listen to any testimony you care to offer.* If Mr. Fendler contends he is entitled to more than 20% he can put on his evidence to that effect.

Mr. Fendler: No, if Your Honor please. The evidence I propose to offer is that it is impossible to apportion profits to the infringement." [Tr. p. 474.]

* * * * *

"Mr. Fendler: Now, may I offer my evidence as to the impossibility of apportionment, if Your Honor please?

The Court: Yes.

Mr. Fendler: Mr. Botsford.

"Q. Mr. Botsford, in your opinion, is it possible to apportion profits received from the motion picture So's YOUR UNCLE to the particular sequence which has been heretofore designated as the 'magician's coat' sequence contained therein?

Mr. Abeles: I object on the ground it is irrelevant, incompetent and immaterial and not the proper proof under the authorities and contrary to the authorities.

The Court: Well, counsel, I have already stated what I am going to do. Why not let him proceed?

Q. By Mr. Fendler: What is your answer, Mr. Botsford? A. No.

Q. In your opinion it is not possible? A. It is not possible—I don't think so.

Mr. Fendler: That is all.

The Court: That is true of any picture, is it not?

The Witness: That you cannot apportion what part of the picture makes a profit.

The Court: That is what I have in mind.

The Witness: I could not think so. I think you would be a genius if you could.

Mr. Fendler: That is all." [Tr. pp. 477-478.]

To summarize the foregoing, the court stated it intended to arbitrarily fix 20% of the profits as allocable to the infringement. Counsel for both plaintiff and defendants directed the court's attention to the fact that there was no evidence in the record to support such a finding. The plaintiff produced evidence that apportionment of profits was impossible. The only evidence produced upon this point by the defendants completely corroborated plaintiff's evidence; the witness Geller expressly testifying that he "didn't know" what proportion of the profits of Universal's picture "So's YOUR UNCLE" were contributed by or allocable to the misappropriated sequence [Tr. pp. 270, 271]. In fact Geller's answer was almost precisely the same as Botsford (plaintiff's witness), Geller stating in answer to the question as to apportionment: "I would have to be a genius to tell you that; I wouldn't know" [Tr. p. 271].

Under the circumstances we submit that the finding as to the allocation of profits is without support in the evidence and that under the authorities and the evidence introduced in the trial court, the District Judge had no alternative but to hold that 100% of the profits realized by

the defendant Universal Pictures Company Inc. belonged to the plaintiff.

The authorities are uniform in support of the proposition that the burden of allocating profits or damages is upon the wrongdoer; and in the absence of definite proof by the defendant that profits resulting from use of infringing material are *not* the result of the defendants' acts, the court will hold all of the profits should be awarded to the owner of the property misappropriated.

In *Callaghan v. Meyers*, 128 U. S. 617, the Supreme Court stated at page 665:

"It is the defendants who are responsible for having blended the lawful with the unlawful and they must abide the consequences on the same principal that he who has wrongfully produced a confusion of goods must alone suffer."

In *Belford v. Scribner*, 144 U. S. 148, the Supreme Court restated the rule at page 508:

"The rule is well settled, that, although the entire copyrighted work be not copied in an infringement but only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff. This was the rule laid down by this court in *Callaghan v. Myers*, 128 U. S. 617, 665, following *Mawman v. Tegg*, 2 Russell, 385, 391, and *Elizabeth v. Nicholson Pavement Co.*, 97 U. S. 126, 129."

In *Davilla v. Brunswick-Balke-Collender Co.*, 94 F. (2d) 567, the Second Circuit Court of Appeals decided that a plaintiff was entitled to 100% of the profits realized from the sale of a double phonograph disc, although the

infringing musical composition appeared on only one side of the record and the other side of the disc contained a musical composition which was more modern and might well have been responsible for most of the sales of the double record. The Second Circuit Court of Appeals allowed 100% of the profits made from the sale of the entire record stating at the conclusion of its opinion:

“Appellant offered no proof, however, as to the cost of making up its composition nor of the sales advantage of one composition over the other. . . .
In the absence of such proof appellant's claim cannot be sustained.”

A fortiori the evidence in the instant case not only lacks a basis or measure of apportionment but affirmatively dispels the possibility of apportionment because the witnesses on both sides agree that no apportionment was possible [Geller, Tr. p. 271; Botsford, Tr. p. 477-8].

B. THE COURT ERRED IN REFUSING TO AWARD ANY PROFITS TO THE PLAINTIFF.

The evidence was uncontradicted [Deft. Ex. 1, Tr. pp. 476-477] that the gross proceeds derived by the defendant Universal Pictures Company from the distribution of the infringing motion picture So's YOUR UNCLE aggregated \$208,812.92; and that after deducting \$133,874.50 for costs and expenses and \$54,421.14 for “distribution fees” (which were retained by the defendant Universal or its wholly-owned subsidiary distributing corporation) that the profit remaining amounted to \$20,517.28 [Tr. p. 477].

The trial court declined to allow all or any portion of these profits to the plaintiff, holding as a matter of law—and we submit contrary to law—that since the damages

sustained by the plaintiff exceeded the profits conceded to have been made by the defendant, that the plaintiff was not entitled to receive all or any portion of the profits derived by the defendant from its distribution of the infringing motion picture.

This determination by the trial court is found in its conclusion of law numbered IV [Tr. p. 39] as follows:

“That the plaintiff is not entitled to judgment awarding all or any portion of the profits which the defendant Universal Pictures Company Inc. shall have made, received or derived from said copyright infringements by reason of the fact that the actual damages suffered by plaintiff due to said copyright infringements exceeds the aggregate amount of profits made, received and derived by said defendant from such copyright infringements.”

We submit that this conclusion of law embodies an entirely erroneous conception of the Copyright Statute and completely misinterprets the decided cases. The Copyright Statute itself provides in part as follows:

“Section 25. Infringement. If any person shall infringe the copyright in any work protected under the Copyright laws of the United States, such person shall be liable: * * * (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, *as well as all the profits which the infringer shall have made from such infringement*” (March 4, 1909, Chap. 320, Para. 25, 35 Stat. 1081, 17 U. S. C. A. 89).

If Congress had intended to allow “either damages *or* profits, whichever is larger in amount”, why does not the statute so provide? If the phraseology “damages *as well*

as all the profits" is to be construed as "either damages or profits whichever is the largest in amount" we have judicial legislation which is inconsistent with the express wording of the statute and which is in contravention of every decided case where both damages and profits appeared and in which both damages and profits were allowed to the plaintiff (*e. g. Atlantic Monthly Co. v. Post Publ. Co.*, 27 F. (2d) 556).

All textwriters and all courts, with one possible exception, agree upon a construction of the Copyright Act in accordance with its precise phraseology.

Amdur, Copyright Law and Practice, p. 1117, paragraph No. 6 "*Profits in Addition to Damages*":

"The copyright owner is awarded the profits derived by the infringer *in addition* to the damages sustained by the proprietor. In this respect recovery in copyright infringement differs from patent suits, for in the latter only the greater of the two, profits *or* damages, is recoverable, not both."

Dean William Hale states the rule in his article in 18 *Corpus Juris Secundum*, 248:

"Actual damages suffered by plaintiff, *in addition to the profits* made by defendant from the infringement, may be recovered."

Siebring Pottery v. Steubenville Pottery, 9 Fed. Supp. 384:

"Under the copyright law a plaintiff is entitled *not only to the profits* of defendants but *also* an amount equivalent to the damage it has suffered."

The same rule is applicable to trade-mark infringements. See *John Stetson Co. v. Stephen L. Stetson*, 58 Fed. Supp. 586 at 596:

“The trademark owner may still recover *damages in addition to defendant's profits.*”

At this point we deem it only fair to the trial court to point out that its decision that plaintiff was only entitled to recover damages or profits, *whichever was the larger in amount*, appears to be predicated solely upon a House Committee Report (numbered 2222, 60th Congress, 2nd Session, Sec. 15) which was incidentally referred to by the Court in *Sheldon v. Metro-Goldwyn Corporation*, 309 U. S. 390 at p. 400. This Report did in fact state in 1909 that the courts up to that date “usually construed” the existing patent statute to mean that a patent infringer was liable either for damages or profits, whichever was the greater in amount. We respectfully direct the attention of this court, however, to the fact that *since* 1909 both damages and profits have been awarded in patent cases, as against a wilful infringer (see for example, *Dowagiac Mfg. Co. v. Deere & Webber Co.*, 284 Fed. 331, 338, C. C. A. 8th (1922); and the authorities hereinbefore cited by us expressly hold a copyright infringer to be liable for both damages and profits. (*Amdur Copyright Law and Practice*, p. 1117; 18 *Corpus Juris* Sec. 248, etc.; see also *Goldmark v. Kreling*, 25 Fed. 349, at page 356.)

In no event, however, can the *Sheldon* case be deemed authority for the position taken by the trial court *because no issue was raised in the Sheldon case as to damages:*

damages were neither pleaded nor proven. The sole issue was whether the copyright proprietor was entitled to recover all or merely a portion of the profits, where the uncontradicted evidence established only a small share of profits as allocable to the infringements and showed most of the profits were in no way attributable thereto.

The petitioners in the *Sheldon* case had argued that there could be "no apportionment of profits" (309 U. S. 390 at p. 398). The Court invoked the analogy of the patent cases in construing Subsection (b) of Section 25 of the Copyright Act providing that an infringer was liable for "all the profits which the infringer shall have made from such infringement"; and held in effect that where no damages are pleaded or proven and the plaintiff elects to seek 100% of the profits, the defendant may prove, by competent evidence that only 20% or even a smaller proportion of the profits are the result of and attributable to the copyright infringement and that the remainder of the profits are not related thereto.

The *Sheldon* decision is particularly significant in that the plaintiffs had testified they had offered to sell the motion picture rights for \$30,000 to the defendants but notwithstanding this testimony the court awarded \$117,000 to the plaintiffs. In the instant case the plaintiff Harold Lloyd Corporation proved actual damages of \$250,000 or more resulting from the infringements and there is no evidence that the profits admittedly received by the defendants were capable of apportionment. In fact the evidence on both sides is that apportionment was impossible.

Under the circumstances plaintiff here contends that it was entitled to an award of *both* damages *and* profits as expressly provided in the Copyright Act.

POINT III.

Where Damages as Well as Profits Are Difficult of Ascertainment the Court Should Award Statutory Damages in Such Sum as Shall Appear to Be Just (Bearing in Mind That the Statutory Schedule of \$100 for the First Infringing Performance and \$50 for Each Subsequent Infringing Performance, Is by Statute Expressly “Not to Be Regarded as a Penalty”).

Section 25 of the Copyright Act expressly provides that the copyright proprietor may recover from an infringer “in lieu of actual damages and profits such damages as to the court shall appear to be just and in assessing such damages the court may in its discretion allow the amounts as hereinafter stated. . . .

“Fourth: In the case of a dramatic or dramatico musical or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance” (Section 25(b) March 4, 1909, Chap. 320, 35 Stat. 1081; Aug. 24, 1912, Chap. 356, 37 Stat. 489).

It is the plaintiff's contention that it was discretionary with the court to award such statutory damages “as to the court shall appear to be just” “in lieu of actual damages and profits” if the trial court—or if this Court—should determine that the nature and circumstances of the case require such award. (*Douglas v. Cunningham*, 294 U. S. 207 at 209; *Brady v. Daley*, 175 U. S. 148, 154; *Bundy Eng. v. Sheldon*, 127 F. (2d) 661, 662, 2nd C. C. A.; *No-Leak-O-Piston Ring Co. v. Norris*, 277 Fed. 951, 4th C. C. A.; *Turner & Dahnken v. Crawley*, 252 Fed. 749 (9th C. C. A.); *Fargo Merc. v. Brechet*, 295 Fed. 823, 829 (8th C. C. A.).)

The defendants took the position at the trial that actual damages were so speculative, remote and conjectural that the court was not justified in awarding to the plaintiff any actual damages whatsoever. Inasmuch as the same speculation and conjecture applies to any attempt to apportion or determine what profits, if any, were made by the defendant Universal Pictures Company from its infringements, we submit as an alternative to be considered by this Court, the authority granted by the statute to award statutory damages in lieu of actual damages and profits.

The number of theaters in which the defendants' infringing motion picture was exhibited in the United States was stipulated as 6636 theaters [Tr. p. 90].

It was also stipulated that the records of the Southern California branch of the Universal Film Exchange (a subsidiary distributing corporation wholly owned by Universal Pictures Company Inc.) reflected the fact that in Southern California 248 theaters exhibited the defendants' infringing picture on 566 play dates [Tr. p. 90].

The significance of these stipulations was stated by plaintiff's counsel at the trial as follows [Tr. p. 169]:

"There is in evidence a stipulation of 6,636 theaters. The evidence here in California, from the Southern California Exchange, shows a ratio of 2.28 playing dates to each theater. If that measure be applied to the 6,636 theaters there will be in excess of 15,000 playing dates; and the court will take judicial notice that the playing dates include anywhere from two to four performances. In other words, if it is on a Saturday or Sunday, there are four performances; if it is just in the evening, it is two performances.

"So we actually have the evidence before Your Honor to establish 30,000 or more infringing per-

formances on the basis of the stipulations in evidence.”

It is well settled that each exhibition of a photoplay constitutes a separate infringing performance. (*Tiffany Productions v. Dewing*, 50 F. (2d) 911; *Patterson v. Century Productions*, 93 F. (2d) 489; *Kalem Films v. Harper Bros.*, 222 U. S. 55; (see also *Brady v. Daly*, 83 Fed. 1003 and 13 Corpus Juris 1149).)

The statutory schedule of \$100 for the first infringing performance and \$50 for each subsequent infringing performance, upon the basis of 30,000 infringing performances, would give the plaintiff a judgment of approximately \$1,500,000. We believe such a judgment would be excessive inasmuch as the plaintiff has testified that the total value of the reissue and re-make rights destroyed by defendants' infringements aggregates only \$250,000. By the same token we feel a judgment for \$40,000 is utterly inadequate.

We therefore submit that the court should allow the statutory damages of \$50—not for each infringing performance—but for each of the 6636 theaters in which the infringing motion picture was exhibited (regardless of the number of play dates or of the actual number of infringing performances in each theater). In this connection we direct the attention of the court to the fact that the only theaters specifically named in the evidence are the Pantages and Hill Street theaters in Los Angeles where the infringing motion picture entitled “So's YOUR UNCLE” played an entire week [Tr. pp. 292, 293]. We believe the court might take judicial notice that these two theaters situated at 7th and Hill Streets and 8th and Hill Streets respectively in Los Angeles, are two of the largest downtown thea-

ters, running at least twelve hours per day, seven days per week, showing each feature motion picture four to five times each day, and that the minimum number of performances to thousands of persons at each exhibition, would be twenty-eight infringing performances and exhibitions each week. It would certainly not be unjust or unfair to the defendant Universal Pictures Company to require it to pay the full statutory schedule of \$50 for each infringing performance. We do not wish, however, to impose any unjust burden. We therefore submit that \$50 for each theater throughout the United States—regardless of the number of infringing performances—is a fair and just award well within the limits contemplated by our legislators when they provided that the full amount scheduled in the statute “shall not be regarded as a penalty” (March 4, 1909, Chap. 320, Section 25(b), 35 Stat. 1081; 17 U. S. C. A. 88).

It should also be noted that the trial court expressly found that the infringements by defendants were each “with the full knowledge and notice of plaintiff’s rights” [Finding VIII, Tr. p. 35]:

“In this connection the court expressly finds that defendants and each of them at all times were fully informed and had full knowledge that they were infringing upon plaintiff’s copyright and the court further finds that the defendant Universal Pictures Company Inc. could and should have reasonably foreseen said infringements upon plaintiff’s copyright.”

Where the defendants act with full knowledge of plaintiff’s rights and in wilful disregard thereof, every doubt as to damages should be resolved against such infringers. (See *Consolidated Rubber Tire Co. v. Diamond Rubber*, 232 Fed. 475, C. C. A. 2; *Rose v. Hirsch*, 94 Fed. 177 at C. C. A. 3.)

Conclusion.

We respectfully submit that with the entire record before this Court, it will expedite justice to have all controverted issues finally settled and determined, including the amount of damages and/or profits, or in the alternative the amount of statutory damages fixed by this court. A new trial will merely once again place the matter at large with a second appeal inevitable.

We are willing and anxious to have the litigation finally determined by an award which this court deems just under all the circumstances and upon all the evidence.

We respectfully submit that plaintiff should be awarded at least \$250,000 actual damages plus 100% of the profits; or in the alternative and in lieu of actual damages and profits, that plaintiff should be awarded such statutory damages as this Court shall deem fair and just.

Respectfully submitted,

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